Public Prosecutor v Samundee Devan a/l Muthu Kerishnan

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 47–5 OF 2000
MOHD HISHAMUDDIN J
29 MARCH 2005

Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking in dangerous drugs — Evidence of chemist — Amount of samples used by chemist — Whether court should make a finding that accused is guilty of the offence of possession of heroin and monoacetylmorphines under s 12(2) of the DDA read together with s 39A(2)(d) of the same Act, instead of the offence of trafficking — Dangerous Drugs Act 1952 ss 12, 39B(1)(a), 39B(2)

Criminal Procedure — Charge — Conviction for different offence than in charge — Accused charged with offence of trafficking in dangerous drugs — Whether should only be one charge in respect of all substances seized from accused — Whether exist two distinct offences so as to require two separate charges — Criminal Procedure Code s 163

The accused was charged for two offences of trafficking in dangerous drugs, namely, heroin and monoacetylmorphines, under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable with death under s 39B(2) of the DDA. Two charges were preferred against the accused. At the close of the case for the prosecution, a prima facie case was made out by the prosecution in respect of the two charges. However, at the end of the defence case the accused was convicted not on the original charges but only on one charge, which was a reduced charge under s 12(2) of the DDA.

Held, convicting the accused on the lesser charge:

(1) A chemist analyzing a substance to determine whether it contains any dangerous drug must carry out the analysis based on an adequate sample. Whether or not a sample used by the chemist for the purpose of the analysis is adequate is for the court to determine and whether or not the quantity of the sample is adequate has to be determined from the particular circumstances of each case. Where the court, after having given due consideration to the particular circumstances of the case, including the adequacy of the sample taken for analysis, is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death (see para 25); *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11 followed.

(2) The court must give due weight to the evidence of an expert witness such as a chemist especially when the evidence is not disputed by another expert. However, an opinion of an expert is just an opinion. It is not conclusive. In the present case the court did not rejected outright the opinion of the chemist. The court accepted the opinion of the chemist as to the nature of the drugs, ie, the substance contained heroin and monoacetylmorphines; but had reservations and some doubts as to accuracy of the chemist's analysis regarding the quantity of the drugs (see para 26). Considering the amount of samples taken for analysis the court was not satisfied that the chemist had given a beyond reasonable doubt evidence as to the actual weight of the heroin and monoacetylmorphines found in the substance seized from the accused (see para 34).

(3) The charge was reduced from the offence of trafficking to that of the lesser offence of possession, that is, possession of 4.875g of heroin and monoacetylmorphines combined. The quantity for the purpose of the finding of guilt was on the basis that out of the whole quantity of substance (6783.8g) only 4.875g were analyzed (see para 30).

(4) There should have been only one charge in respect of all the substances seized from the accused. There were no two distinct offences so as to require two separate charges (s 163 of the Criminal Procedure Code). Even assuming the two charges were regular, it was still open to the court to make only one finding of guilt considering the peculiar facts of the case (see para 33).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana dua kesalahan mengedar dadah berbahaya, iaitu, heroin dan monoacetylmorphines, di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dijatuhkan hukuman mati di bawah s 39B(2) ADB. Kedua-dua pertuduhan itu dibuat terhadap tertuduh. Di penutup kes pihak pendakwa, satu kes prima facie telah dibuat oleh pihak pendakwa berkaitan dua pertuduhan tersebut. Bagaimanapun, di akhir kes pihak pembela, tertuduh telah disabitkan bukan berdasarkan pertuduhan–pertuduhan asal tetapi hanya atas satu pertuduhan, yang merupakan satu pertuduhan yang diringankan di bawah s 12(2) ADB.

Diputuskan, menyabitkan tertuduh atas pertuduhan yang diringankan:

(1) Seorang ahli kimia yang menganalisa bahan untuk menentukan sama ada ia mengandungi apa-apa dadah berbahaya hendaklah mengendalikan analisis itu berdasarkan sampel yang mencukupi. Sama ada atau tidak sampel itu digunakan oleh ahli kimia bagi tujuan analisa itu mencukupi adalah untuk mahkamah menentukannya dan sama ada atau tidak kuantiti sampel itu mencukupi hendaklah ditentukan berdasarkan keadaan khusus setiap kes. Di mana mahkamah, selepas memberikan pertimbangan kepada keadaan khusus kes itu, termasuklah kecukupan sampel yang diambil untuk analisis itu, adalah diragui sama ada tertuduh telah melakukan kesalahan itu pada tahap yang rendah atau tinggi keseriusannya, mahkamah hendaklah membuat

penemuan pada tahap yang rendah, khususnya di mana penemuan pada tahap tinggi akan membawa kepada hukuman mati mandatori (lihat perenggan 25); *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11 diikut.

(2) Mahkamah hendaklah mengambil berat keterangan seorang saksi pakar seperti ahli kimia terutamanya bila keterangan itu tidak dipertikaikan oleh pakar lain. Namun, pendapat seorang pakar hanyalah satu pendapat. Ia tidak konklusif. Dalam kes semasa, mahkamah tidak menolak terus pendapat ahli kimia itu. Mahkamah menerima pendapat ahli kimia itu berkaitan sifat dadah tersebut, iaitu bahan itu mengandungi heroin dan monoacetylmorphines; tetapi merasa keraguan tentang ketepatan analisa ahli kimia itu berkaitan kuantiti dadah itu (lihat perenggan 26). Dengan mengambilkira jumlah sampel yang diambil untuk analisa, mahkamah tidak berpuas hati yang ahli kimia itu telah memberikan keterangan melampaui keraguan munasabah berkaitan berat sebenar heroin dan monoacetylmorphines yang ditemui dalam bahan yang dirampas daripada tertuduh itu (lihat perenggan 34).

(3) Pertuduhan itu telah dikurangkan daripada kesalahan pengedaran kepada kesalahan yang lebih kurang iaitu pemilikan, iaitu memiliki 4.875g heroin dan monoacetylmorphines. Kuantiti bagi tujuan memutuskan kebersalahan tertuduh adalah berdasarkan daripada keseluruhan kuantiti bahan itu (6783.8g) hanya 4.875g telah dianalisa (lihat perenggan 30).

(4) Sepatutnya hanya perlu ada satu pertuduhan berkaitan kesemua bahan yang dirampas daripada tertuduh. Tiada dua kesalahan yang berbeza sehingga perlunya ada dua pertuduhan (s 163 Kanun Acara Jenayah). Meskipun dengan mengandaikan dua pertuduhan tersebut adalah teratur, ia masih terbuka kepada mahkamah untuk hanya membuat satu penemuan kebersalahan setelah mengambilkira fakta-fakta khusus kes tersebut (lihat perenggan 33).]

Notes

For a case on conviction for different offence than in charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1009.

For cases on trafficking dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 290–391.

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489 (refd)

Leong Boon Huat v Public Prosecutor [1993] 3 MLJ 11 (folld)

PP v Ang Soon Huat [1999] 1 MLJ 1 (refd)

Legislation referred to

Criminal Procedure Code s 163

Dangerous Drugs Act 1952 ss 12(2), 37(da), 37(j), 39B(1)(a), 39B(2)

Mohd Azhar Iman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Gobind Singh Deo (Karpal Singh & Co) for the accused.

Mohd Hishamuddin J:

[1] In this trial the accused was charged for two offences of trafficking in dangerous drugs, namely, heroin and monoacetylmorphines, under e s 39B(1)(a) of th Dangerous Drugs Act 1952 ('the DDA') and punishable with death under s 39B(2) of the same Act. The charges read —

> First charge
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> Bahawa kamu pada 2 April 1999, jam lebih kurang 10.15 pagi di tempat letak kereta Flat 'C', Taman Petaling Utama, Jalan Klang Lama, di dalam daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu, sejumlah 33.2g heroin dan monoacetylmorphines (5.8g heroin dan 27.4g monoacetylmorphines); dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.
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> Second charge
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> Bahawa kamu pada 2 April 1999, jam lebih kurang 10.15 pagi di tempat letak kereta Flat 'C', Taman Petaling Utama, Jalan Klang Lama, di dalam daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu, sejumlah 514.1g heroin dan monoacetylmorphines (73.6g heroin dan 440.5g monoacetylmorphines); dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] It will be observed that the two charges are identical as to time (10.15am), date (2 April 1999), place (car park of Flat C) and the nature of the drugs (heroin and monoacetylmorphines). The difference lies only in the quantities of the two named drugs. In the first charge, the quantities specified are 5.8g of heroin and 27.4g of monoacetylmorphines. In the second charge, the quantities specified are 73.6g of heroin and 27.4g of monoacetylmorphines.

[3] From the evidence adduced by the prosecution, which I shall allude to in due course, the prosecution, strictly, should not have preferred two charges. There should have been only one charge: the prosecution should have combined the two charges into one. For the evidence will show that there was only a single incident leading to the arrest of the accused, and that the drugs were recovered from one place only, namely, from the boot of a car. Hence, as shown at a later part of this judgment, at the conclusion of the trial, when I made the finding of guilt, I have treated the two charges as one charge.

[4] I shall now proceed to the prosecution case. The main witness in this case is L/Cpl Chandran a/l V Subramaniam (PW7) of the Criminal Intelligence Unit, Police Headquarters, Petaling Jaya. On the day in question (2 April 1999), at about 7.40am, based on information received regarding the theft of a vehicle, he and L/Cpl Appasamy left the CID Petaling Jaya office and proceeded by car to an address known as Flat C, Taman Petaling Utama, Off Klang Lama, Petaling Jaya. At the car park of the flat they saw a blue Honda Civic car bearing registration number WFV 2724

parked (the prosecution adduced evidence that it was a false number plate). They parked their car some distance away and made an observation on the Honda Civic car. After waiting for about one and a half hour, they saw the accused going to the Honda Civic and opening the boot of the car. They saw him taking out a red plastic package from the car boot and closing the boot. They then immediately got out of their car, rushed towards the accused, seized the plastic package, and arrested him. Upon opening the package, they saw a pinkish powdery substance which they suspected to be heroin. They asked the accused to open up the boot. The accused took out from his trouser pocket the car keys and did as asked. Inside the boot, PW7 saw a purple beg containing two red plastic packages. Upon opening the two packages, he saw a pinkish powdery substance which he suspected to be heroin. PW7 also saw two more red plastic packages in the boot which, when opened, contained a substance of similar appearance. The two police officers seized the purple bag, the five red plastic packages, the car keys and the car. They made an arrangement for the accused to be taken to the Petaling Jaya police station.

[5] The packages were subsequently sent to the Chemistry Department for the contents to be analysed by a Government Chemist. The Government Chemist, Encik Ismail bin Talib (PW6), having analysed the substances in the packages, found them to contain certain quantities of heroin and monoacetylmorphines (the specific amounts as stated in the charges).

[6] At the close of the case for the prosecution, I found that a prima facie case had been made out by the prosecution in respect of the two charges. I was satisfied on the evidence that the accused was prima facie in possession of the five packages. And, accordingly, I had invoked the presumption under section 37(da) (iiia) of the DDA.

Thereafter, I called upon the accused to enter his defence on the two charges. He elected to make a statement from the dock. He only made a brief statement. Basically it was a mere denial of the allegation made by the prosecution, save the fact of having been arrested by the police. He said that on the day in question he went to visit his mother at the latter's flat at Flat Sri Manjoi, Off Klang Lama. The purpose of the visit was to give his mother some money. While at his mother's flat, he went out of the flat for a smoke. While he was smoking his cigarette, he was arrested. He said he was arrested by one 'Encik Samy'. In his statement he said he did not know to whom the car keys, the Honda Civic car, the bag and the packages belonged.

[7] The defence called two witnesses, namely, the accused's mother (DW1) and the accused's sister (DW2). I found their evidence to be irrelevant as they were in the flat at the time of the arrest and did not know anything that transpired between the accused and the two police officers at the time of the arrest. Nor did they know anything about the car or the car keys or the bag and packages seized.

[8] At the end of the defence case, after hearing submissions, I convicted the accused — but not on the original charges. In the light of my observation as stated at the beginning of this judgment, I convicted the accused only on one charge, which

was a reduced charge: the offence of possession of 4.875g of heroin and monoacetylmorphines combined under s 12(2) of the DDA read with s 39A(1)(d) of the same Act.

[9] Section 12(2) of the DDA provides —

> (2) No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.

[10] Section 39A(1)(d) provides —

> 39A. Increased penalty where the subject matter is the prescribed amount of certain dangerous drugs.
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> (1) Every person found guilty of an offence against this Act where the subject matter of the offence is —
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> ...
>
> (d) a total of 2g or more but less than 5g in weight of heroin, morphine and monoacetylmorphines or a total of 2g or more but less than 5g in weight of any two of the said dangerous drugs;
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> .....
>
> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for a term which shall not be less than two years but shall not exceed five years, and he shall also be punished with whipping of not less than three strokes but not more than nine strokes.

[11] Why did I find him guilty of the lesser offence of possession of heroin and monoacetylmorphines under Dangerous Drugs Act 1952 s 12(2) of the DDA instead of the original charges of trafficking? Why did I reduce the amount of the drugs, which I considered to be the subject matter of the offence under s 12(2), to that of 4.875g of heroin and monoacetylmorphines combined?

[12] I did so because I was not fully satisfied with the analysis as carried out by the Government Chemist, PW6, who had taken very small quantities — indeed, extremely small quantities — of samples for the purpose of the quantitative test. I shall proceed to elaborate.

[13] From the evidence of PW6, each of the five packages contained several smaller packages and each of the smaller packages further contained tiny packages tied in groups by rubber bands. There were more than a thousand of these tiny packages. During the trial, when taking the notes of evidence, to go through the exhibits and to record them, was a slow and painstaking exercise. In this judgment I do not propose to go into labourous detail describing them. But for the sake of simplicity I think it suffice to say that for the purpose of analysis, PW6 neatly separated the substance found in the tiny packages into 15 lumps (groups), based on where the tiny packages were found in the bigger packages (in other words, he ensured that there

was no indiscriminate intermixing of the tiny packages). For example, the substance found in the tiny packages that originated from (say) 'package A' were mixed together and put aside as one lump, while the substance from the tiny packages that originated from (say) 'package G' were mixed together as another separate lump, and so forth. From the total number of tiny packages, and depending from which package they originated, PW6 managed to create, all in all, 15 lumps of substance for analysis, namely:

(1) the lump of substance originating from package A;

(2) the lump of substance originating from package G;

(3) the lump of substance originating from package H;

(4) the lump of substance originating from package J1;

(5) the lump of substance originating from package K;

(6) the lump of substance originating from package L;

(7) the lump of substance originating from package M;

(8) the lump of substance originating from package N;

(9) the lump of substance originating from package O;

(10) the lump of substance originating from package P;

(11) the lump of substance originating from package Q;

(12) the lump of substance originating from package R;

(13) the lump of substance originating from package S;

(14) the lump of substance originating from package T; and

(15) the lump of substance originating from package U.

[14] Then PW6 homogenized the substance in each of the lumps. Having done that, he proceeded to carry out the quantitative test (after having earlier carried out the Frohde test, the Marquis test, the Thin Layer Chromatography test and the Gas Chromatography Mass-Spectrometry test), that is, the Gas Chromatography test. He took a very small quantity of five random samples from each of the homogenized lumps. Each random sample weighed from 55mg to 75mg. This being the range, the average weight of a sample was, therefore, approximately 65mg. Taking this as the average weight of a sample, the total weight of the samples for each lump was, therefore, 5 x 65mg, which is, 325mg. It was on these very small quantities of samples that PW6 carried out his Gas Chromatography analysis on each of the 15 lumps; and arrived at his findings. For example, based on his analysis on the 325mg random samples taken from the lump originating from package A, he made a finding that the substance from package A, which had a net weight of 458.5g, contained 5.8g heroin and 27.4g monoacetylmorphines.

[15] For the sake of completeness, I shall set out the evidence of the chemist (PW6) and it is as follows:

Berikut adalah analisis yang saya jalankan. Pertama ujian warna. Ada ujian warna —

(a) ujian Frohde;

(b) ujian Marquis.

Bagi ujian-ujian ini, saya keluarkan sedikit sample perwakilan (representative sample) dari satu lot bahan yang homogeneous. Kedua-dua ujian warna menunjukkan kehadiran heroin dan monoacetylmorphines.

Ujian kedua dikenali sebagai ujian TLC — Thin Layer Chromatography. Sedikit sample perwakilan dikeluarkan dari satu lot bahan yang homogeneous tadi bagi tujuan analisis ini. Hasil ujian menunjukkan kehadiran heroin dan monoacetylmorphines.

Ujian ketiga, ujian GCMS — Gas Chromatography Mass-Spectrometry. Sedikit sample perwakilan dikeluarkan dari lot bahan yang homogeneous tadi. Hasil keputusan menunjukkan dan mengesahkan bahan tersebut mengandungi heroin dan monoacetylmorphines.

Untuk ujian kuantitative, saya jalankan analisis yang dikenali sebagai GC — Gas Chromatography. Saya keluarkan 5 sample perwakilan yang ditimbang secara tepat yang beratnya di antara 55–75mg dari lot bahan yang homogeneous tadi. Sample-sample ini saya jalankan analisis GC — Gas Chromatography. Dengan menggunakan pengiraan matematik dan statistic, saya memperolehi nilai sebenar terrendah peratus heroin dan monoacetylmorphines. Dengan nilai ini saya mengira kandungan heroin dan monoacetylmorphines dari berat bersih lot bahan yang saya terima. Dengan maksud lain, nilai ini didarab dengan berat bersih lot bahan yang saya terima dalam eksibit X [ie 1st lump — package A], yakni, dari 458.5g saya memperolehi 5.8g heroin dan 27.4g monoacetylmorphines.

[16] PW6 further said that a similar analysis as the above was carried out in respect of the other packages/lumps.

[17] As I have said, there were all in all 15 lumps. Therefore, the total weight of the random samples taken for all the 15 lumps was 15 x 325mg, which is equal to 4.875g. Now, the net weight of the pre-analysed substance of each of the 15 lumps was as follows:

(1) the net weight of the pre-analysed substance from the lump that originated from package A was 458.5g;

(2) the net weight of the pre-analysed substance that originated from the lump from package G was 457.3g;

(3) the net weight of the pre-analysed substance from the lump that originated from package H was 387.6g;

(4) the net weight of the pre-analysed substance that originated from the lump from package J1 was 450.7g;

(5) the net weight of the pre-analysed substance from the lump that originated from package K was 456.3g;

(6) the net weight of the pre-analysed substance that originated from the lump from package L was 456.4g;

(7) the net weight of the pre-analysed substance from the lump that originated from package M was 454.2g;

(8) the net weight of the pre-analysed substance from the lump that originated from package N was 459.5g;

(9) the net weight of the pre-analysed substance from the lump that originated from package O was 458.8g;

(10) the net weight of the pre-analysed substance from the lump that originated from package P was 462.9g;

(11) the net weight of the pre-analysed substance from the lump that originated from package Q was 455.8g;

(12) the net weight of the pre-analysed substance from the lump that originated from package R was 454.4g;

(13) the net weight of the pre-analysed substance from the lump that originated from package S was 463.3g;

(14) the net weight of the pre-analysed substance from the lump that originated from package T was 449.8g; and

(15) the net weight of the pre-analysed substance from the lump that originated from package U was 458.3g.

[18] By adding up the net weight of all the 15 lumps, I obtained a total net weight of 6783.8g. But it is to be recalled that earlier we have noted that the total weight of all the random samples taken from the 15 lumps was 4.875g. This means that in terms of weight, the total weight of the random samples was only 0.07186% of the total net weight of the pre-analysed substance. In my judgment, it is indeed a very small percentage. It is not even 0.5%. I did not think it was adequate for the purpose of the analysis. I had my doubts on the accuracy of the analysis regarding the quantity.

[19] At this juncture, in the light of the above finding, I must pause and refer to *Leong Boon Huat v Public Prosecutor* [1993] 3 MLJ 11, a judgment of the Supreme Court which I brought to the attention of the learned DPP and defence counsel on 4 February 2005, when they appeared before me for oral submission at the conclusion of the defence case. In the light of this judgment, I posed to both the DPP and counsel the following question:

> In view of the amount of samples used by the Chemist in the present case, on the assumption that the court accepts the prosecution evidence on possession, whether in the light of *Leong Boon Huat v Pendakwa Raya* [1993] 3 CLJ 603, this court should make a finding that the accused is guilty of the offence of possession of heroin and monoacetylmorphines under s 12(2) of the DDA read together with s 39A(2)(d) of the same Act, instead of the offence of trafficking?

[20] I directed them to research and to submit on the issue, which they commendably did.

[21] In this case that I have cited, the total weight of the samples taken for analysis by the Government Chemist was 'more than 10% of the net weight of 793.85g.' of plant material. The Supreme Court held the sample taken for the purpose of analysis must be adequate; and what is adequate or not is for the court to decide: the court is not bound by the opinion of the chemist on the issue of adequacy of sample. In the case referred to, the Supreme Court held:

> It is true that the chemist did say that he had conducted a physical examination of the whole plant material, by which, we suppose, he meant a visual examination, aided no doubt by microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity have involved, the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the Chemist had carried out the chemical tests, were adequate, having regard to the total weight of the plant material, for the reasons stated.

[22] The Supreme Court ruled that the case against the accused was not proved with certainty which was necessary to justify a verdict of guilty on the charge of trafficking of cannabis under s 39B of the DDA.

[23] The Supreme Court then, citing with approval the Singapore case of *Public Prosecutor v Ang Soon Huat* [1999] 1 MLJ 1, went on to rule that where the court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death. Accordingly, the Supreme Court reduced the charge to that of the offence of possession of cannabis, an offence under s 39A of the DDA.

[24] The learned Deputy Public Prosecutor, Encik Azhar Iruan bin Mohd Ariffin, however, argued that the court was bound by the opinion of the expert, the Government Chemist, on the question of the adequacy of the sample. The learned DPP referred to *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489. In that case, Abdul Hamid Mohamad JCA (as he then was) delivering the majority judgment of the Court of Appeal said (at pp 577–578):

> Clearly, the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of the tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. So, I do not think that it is correct to say that the case laid down the principle that at least 10% of the total weight must be taken as sample for the purpose of carrying out the tests. Indeed, I do not think that that case laid down any general principle. The decision was confined to the circumstances of the case and, as stressed by the court, what would be an adequate quantity would depend on the particular circumstances of each case. Even then, the question is: In the absence of a specific provision of the law, who is to determine what is the adequate quantity that should be taken as sample(s) for the purpose of carrying out the tests. The court or the chemist? Who is the expert? Who carries out the test? The answer must be the chemist.

[25] With the greatest respect, whilst I agree that the Supreme Court in *Leong Boon Huat* did not lay down any '10% principle', I am, however, unable to share the view, as expressed above by Abdul Hamid JCA, that the Supreme Court in that case did not lay down *any* general principle at all. In my opinion the following principles can be abstracted from the judgment of the Supreme Court:

(1) A chemist analyzing a substance to determine whether it contains any dangerous drug must carry out the analysis based on an adequate sample.

(2) Whether or not a sample used by the chemist for the purpose of the analysis is adequate is for the court to determine.

(3) Whether or not the quantity of the sample is adequate has to be determined from (to quote the Supreme Court) '*the particular circumstances of each case*'.

(4) Where the court, after having given due consideration to the particular circumstances of the case, including the adequacy of the sample taken for analysis, is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

[26] I do of course accept that a court of law must give due weight to the evidence of an expert witness such as a chemist especially when the evidence is not disputed by another expert. Indeed, by the words 'the particular circumstances of each case' the Supreme Court must have meant that the opinion of the chemist must also, besides other factors, be seriously considered before a decision is made. But it is trite law that the chemist (or any expert for that matter) does not to have the final say. It is the judge who makes the final determination. True, the judge is not an expert in this field. But he is not all that helpless. He has his general knowledge to rely on. He has his experience in hearing many drug trafficking cases. He is familiar with all the various tests normally carried out by the chemist when analyzing a given substance to detect the presence of drugs, and if present to determine the nature and the weight of the same. He has his common sense, and his sense of justice and fairness, to guide him. An opinion of an expert is just an opinion. It is not conclusive. I must stress here that in the present case, I am not rejecting outright the opinion of the chemist. I respect and accept the opinion of the chemist as to the nature of the drugs, that is to say, the substance contained heroin and monoacetylmorphines; but my only reservation is that I had some doubts as to accuracy of his analysis regarding the quantity of the drugs.

[27] It is to be observed that Abdul Aziz Mohamad SCJ in *Gunalan Ramachandran*, in his a dissenting judgment, nevertheless, agrees with the majority view as given by Abdul Hamid JCA in relation to *Leong Boon Huat*. For the learned judge said (at p 595):

> As my learned brother has observed, the case *Leong Boon Huat* did not lay down any particular principle. It was a decision for that case only.

[28] Be that as it may, it is interesting to note that in the concluding paragraph of the judgment His Lordship did, however, say (at p 595):

The only principle that one might be tempted to derive from *Leong Boon Huat* is that in the case of a method of determination such as that adopted by the chemist, it is entirely up to the court to decide, even in the absence of expert evidence to that effect, that the amount taken for analysis is insufficient having regard to the total amount of the bulk.

[29] I have the greatest respect for the views of the learned judges of the Court of Appeal in *Gunalan Ramachandran*, but needless to say I am bound by the principles as laid down by the Supreme Court in *Leong Boon Huat*.

[30] Now, reverting to the case before me, it was on the basis of the above principles as propounded by the Supreme Court in *Leong Boon Huat* that I reduced the charge from the offence of trafficking to that of the lesser offence of possession, that is, possession of 4.875g of heroin and monoacetylmorphines combined. Here, I must explain why I made this finding of 4.875g of heroin and monoacetylmorphines combined. I chose this amount of 4.875g as the quantity for the purpose of the finding of guilt on the basis that out of the whole quantity of substance (6783.8g) only 4.875g was analyzed. In making this finding I am guided by the following dicta in *Leong Boon Huat*:

[31] To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% — and we, in ordinary parlance, it would not be incorrect to say that it bears such a meaning — then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the Appellant was in possession of a little more 79.30g of cannabis, which would be well below the statutory minimum of 200gs of cannabis required for the operation of the presumption of trafficking under s 37(da) s 37(da) of the DDA.

[32] In my opinion, the reason for reducing the charge in the present case is more compelling as compared to *Leong Boon Huat*. For in *Leong Boon Huat* the total weight of samples taken was more than 10%, whereas in the present case, the total weight of the samples taken was merely 0.07%.

[33] The learned DPP submitted that if at all I were to find the accused guilty of a lesser offence then it should be a double finding of guilt and a double conviction since two charges had been preferred against the accused. The DPP then explained why two charges had been preferred against the accused. The first charge was in relation to the red plastic package which the accused was holding at the time of arrest; whilst the second charge relates to the remaining four packages found in the boot of the car. The learned defence counsel, Encik Gobind Singh Deo, in reply, argued that the court was entitled to make only one finding of guilt and to record only one conviction in respect of the two charges since the prosecution should not have preferred two charges in the first place. I had accepted the argument of the defence counsel that there should have been only one charge in respect of all the five packages seized in the first place. There were no two distinct offences so as to require two separate charges: see s 163 of the Criminal Procedure Code. Even assuming the two charges were regular, it was still open to the court to make only one finding of guilt considering the peculiar facts of the case. It is to be appreciated that the finding of

A 4.875g in the lesser offence of possession was in relation to the whole substance obtained from all the 15 lumps (ie from all the five main packages seized).

[34] Lest that I might be misunderstood, I wish to make it clear that in this judgment I am not advocating a '10% rule'. There is already in existence the statutory
B 10% rule in the form of s 37(j) of the DDA to be applied in the specified circumstances, but that section is not relevant nor an issue in the present case. All that I am saying is that, considering the amount of samples taken for analysis, which I thought was too little under the circumstances, I was not satisfied that the chemist had given a beyond reasonable doubt evidence as to the actual weight of the heroin and monoacetylmorphines found in the substance.
C

[35] In the present case, having found the accused guilty of the lesser charge, I sentenced the accused to five years' imprisonment with effect from the date of conviction and nine strokes of whipping.

D **[36]** In passing sentence, I took into account the following factors:

(1) the age of the accused — he was nineteen years of age at the time of the commission of the offence;

(2) that he had no record of any previous conviction;

E (3) that he had been under remand since the day of the arrest;

(4) the quantity and the nature of the drugs that he was found (or, rather, deemed by the court) to be in possession in this case 4.875g of heroin and monoacetylmorphines, combined; and

F (5) that drug related offences were and are rampant in this country and thus public interest called for a deterrent sentence.

Accused convicted on lesse charge.

G Reported by Peter Ling

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